Supreme Court, U.S.
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No. 01-738

In The

Supreme Court of the United States

RICHARD N. MOSEMAN AND DANIEL ROUSSEAU,

Petitioners,

v.

BLAKE VAN LEER, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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STATEMENT PURSUANT TO RULE 29.6

Respondents Garnet of Maryland, Inc. and Garnet of Virginia, Inc., now known as King George Landfill, Inc., are owned by USA Waste of Maryland, Inc., a wholly owned subsidiary of Waste Management, Inc. Waste Management, Inc. is a publicly held corporation trading on the New York Stock Exchange under the symbol "WMI."

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Blake Van Leer ("Van Leer"), BKJB Partners ("BKJB"[1]), and the Garnet Companies[2] oppose the petition by Richard N. Moseman ("Moseman") and Daniel Rousseau ("Rousseau") for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

COUNTERSTATEMENT OF THE CASE

The Petition is premised upon Moseman and Rousseau's assertion that the Fourth Circuit's application of the "reasonable inquiry" standard to Section 29(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(a), conflicts with the "actual knowledge" standard applied in the Ninth and Fifth Circuits. This supposed conflict is both imaginary and, when viewed in light of the undisputed facts of this case, irrelevant.

This dispute arises from the 1996 sale of several landfill development companies owned by Moseman, Rousseau, Van Leer and BKJB to Sanifill, Inc. In exchange for the millions of dollars and other consideration they received in that transaction, Moseman and Rousseau each

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[1] "BKJB" includes Respondents Robert D. Cheeley, Keith Breedlove, James E. Butler, Jr., and Bobby M. Thomas, and the BKJB Partnership.

[2] "The Garnet Companies" refers to Respondents Garnet of Maryland, Inc., Garnet of Virginia, Inc., Garnet, Inc., Garnet Enterprises, Inc., Cross Road Trail, Inc., Rollins Avenue, Inc., and King George Land Co.

agreed to release and forever discharge any and all claims against Van Leer, BKJB and the other parties to the transaction. Despite those releases, Moseman and Rousseau later sued Van Leer, BKJB and the Garnet Companies claiming that they (Moseman and Rousseau) had been defrauded in the 1996 transaction. Both lower courts found their claims barred by the releases they signed, but Moseman and Rousseau argue that the releases are "void" under Section 29(a) because they purportedly lacked "actual knowledge" of the supposed fraud when they signed the releases. Yet, even if "actual knowledge," rather than "reasonable inquiry," is the appropriate standard, the facts simply fail to support Moseman and Rousseau's argument.

As Rousseau acknowledged in his sworn declaration, the negotiations with Blanchet, the first prospective investor, and then Sanifill were "every man for himself." Declaration of Daniel M. Rousseau, Exhibits to BKJB Defendants' Motion for Summary Judgment against Moseman (hereinafter "Summary Judgment Exhibits"), Ex. B. See also Petition at 18a. Each of the shareholders was advised repeatedly by the Garnet Companies' corporate counsel to retain separate legal counsel for those negotiations; only Rousseau chose not to heed that advice. Rousseau negotiated his own deal with Blanchet which included terms, such as a five-year consulting agreement and lifelong health insurance, specific to Rousseau's needs. Rousseau knew that the shareholders were negotiating different deals, but he never asked for any information about the other shareholders' compensation. Upon learning that negotiations with Blanchet had failed and that negotiations were going forward with

Sanifill, Rousseau immediately informed Van Leer that he (Rousseau) would be satisfied with the same terms of redemption he had agreed to accept from Blanchet.

Accordingly, on January 3, 1996 – the day before Van Leer and BKJB began negotiating the letter of intent with Sanifill – Rousseau executed a redemption agreement on the same terms he had negotiated with Blanchet. That same day, Rousseau executed a mutual release in which he agreed to release and forever discharge any and all claims against Van Leer, BKJB and the other parties to the transaction. In signing the mutual release, Rousseau acknowledged that he entered the mutual release "voluntarily," "without duress or compulsion," and of his own free will, and that he was *not* "relying upon any representation, oral or written, made by the other parties, or any of them, or their agents or representatives." Petition at 17a-18a.

Like Rousseau, Moseman negotiated his own deal with Blanchet with terms, such as a $1 million advance to save his California ranch from foreclosure, specific to Moseman's needs. And like Rousseau, Moseman told Van Leer that he was willing to redeem his interests in the Sanifill transaction under essentially the same terms as in the proposed Blanchet transaction. Unlike Rousseau, however, Moseman continued to negotiate with Van Leer for additional compensation after the letter of intent with Sanifill was signed on January 5, 1996. After several days of negotiations, Moseman agreed on January 9, 1996, to redeem his stock on better terms than he had secured from Blanchet. Like Rousseau, Moseman agreed to execute a mutual release in favor of the other parties. Prior to signing the mutual release, however, Moseman requested

additional information from Van Leer and the Garnet Companies' corporate counsel, Barry Levin, about the compensation Van Leer was to receive from Sanifill. Moseman knew that the shareholders were receiving different compensation terms.[3] Moreover, Moseman did not trust Van Leer. Although Van Leer and Levin informed Moseman that Van Leer was to receive a cash payment up front and deferred payments based upon the operation of the landfill (*i.e.*, a royalty) in an amount that was expected to exceed Moseman's overall compensation, they refused to provide Moseman with more specific information or any documentation related to the Sanifill transaction.

In light of Van Leer and Levin's refusal to provide information and Moseman's distrust of Van Leer, Moseman believed that Van Leer was trying to deceive him. Moreover, Moseman formed this belief *before* he signed the mutual release, as his attorney, Andrew Shafer, candidly explained:

> Q: Well, there was a part of you that believed that other parties to this transaction were getting a better deal than Mr. Moseman; correct?
>
> A: Well, you know, certainly you would say to yourself – well, why not. *Obviously, there is some sugar going on back here and who knows what.* That tied in with Levin's comment about Blake [Van Leer] getting somewhat more than Dick [Moseman].

---

[3] In fact, Moseman talked with Rousseau and learned that Rousseau was receiving less compensation than Moseman, but Moseman did not apprise Rousseau of that fact.

Q: What do you mean by "some sugar going on back here"?

A: That there was something happening that they didn't want us to know. *It was pretty obvious.* Otherwise, why wouldn't they give us the document?

Q: You recognized that at the time of the deal?

A: *I recognized at the time of the deal that I didn't think that they were telling me everything that there was to be told.* Obviously, because they would have given me the document.

Q: And, in fact, the reason they weren't telling you everything, you believed at that time, was that other parties to the transaction were being treated better than your client[?]

A. Well, Barry [Levin] told me that. That Blake [Van Leer] was getting more. My assumption was that Blake didn't want Dick [Moseman] to know that he was getting more.

Deposition of Andrew Shafer, Summary Judgment Exhibits, Ex. J, at 376-77 (emphasis added). See also Petition at 22a. Although Moseman and Shafer knew that they were being denied information, they did not ask BKJB or Sanifill (or their respective counsel) for any information or inform them that Moseman was being denied information.

Despite his distrust of Van Leer, his knowledge that he was being denied information, and his belief that he was being deceived about the Sanifill transaction, Moseman executed the mutual release on January 24, 1996. In the mutual release, which Shafer helped draft, Moseman agreed to release and forever discharge any and all claims

against Van Leer, BKJB and the other parties to the transaction. Moseman also acknowledged that he entered the mutual release "voluntarily," "without duress or compulsion," and of his own free will, and that he was *not* "relying upon any representation, oral or written, made by the other parties, or any of them, or their agents or representatives." Petition at 17a. More importantly, in signing the mutual release, Moseman made the conscious decision not to file a lawsuit. As Shafer testified:

> Q: At the time that . . . Moseman signed the Mutual Release, [Moseman's California] ranch was no longer in danger. Right?
>
> A: Yes. At that time the debt [on the ranch] had been satisfied. *And so at that point, the equation was do we have a lawsuit over this or do we go forward?* Recognize, my client still had not received the $2.5 million on the note.
>
> * * *
>
> Q: The original question though was why Mr. Moseman signed the Mutual Release, knowing full well that he had been denied material information.
>
> A: At that point [Mr. Moseman] still hadn't received the promissory note. Without the promissory note, there was no entitlement to the money, necessarily. *He would have been looking at buying a lawsuit. And a decision was made to sign [the Mutual Release].*

Id. at 227-28. Moseman and Shafer simply made the business decision not to "rock the boat" and to "tak[e] what we got." *Id.* at 227, 376.

Given the foregoing facts, the distinction between "actual knowledge" and "reasonable inquiry" is meaningless. At the time Rousseau executed his release, he knew that it was "every man for himself" and that the other shareholders were negotiating different deals. Nevertheless, Rousseau accepted his deal and signed his release *before* Van Leer and BKJB even began negotiating the letter of intent with Sanifill. Similarly, at the time Moseman executed his release, he actually believed that he was being deceived, but chose to accept his deal rather than file a lawsuit.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT IN THE CIRCUITS

Contrary to Petitioners' main argument, the Circuits are not split over the question presented. No court of appeals has ever rejected the interpretation of Section 29(a) espoused by the Seventh Circuit in *Goodman v. Epstein*, 582 F.2d 388 (7th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979), and now by the court below. The cases cited by Petitioners – *Royal Air Properties v. Smith*, 333 F.2d 568, 571 (9th Cir. 1964); *Burgess v. Premier Corp.*, 727 F.2d 826 (9th Cir. 1984); and *Murtaugh v. University Computing Co.*, 490 F.2d 810 (5th Cir. 1974) – do not conflict with *Goodman*. Indeed, they do not address the issue at all.

Royal Air, the flagship of Petitioners' argument, does not even involve a release. The defendant in *Royal Air* contended that the plaintiff was aware or should have been aware of the pertinent undisclosed information and thereby "waived" his claim. The district judge went so far

as to say that the plaintiff may have been negligent for not discovering the fraud earlier but that a *waiver – not a release* – required actual knowledge of all the facts. 333 F.2d at 571. The Ninth Circuit did not write as much as a single syllable on the subject of Section 29(a) or releases.

Similarly, the Fifth Circuit did not consider a release in *Murtaugh*. Once again, the issue related to the plaintiffs' *waiver* of rights in the context of a settlement agreement. After the jury returned a defense verdict, plaintiffs appealed arguing that Section 29(a) barred any "waiver" of their claims unless they had "intentionally and knowingly waived the rights granted them by the securities laws" and that no such finding was made by the jury. *Id.* 490 F.2d at 817. Because the plaintiffs had failed to request an appropriate special jury interrogatory, the court of appeals rejected plaintiffs' argument, holding that the trial court's finding that the plaintiffs' "intentionally and knowingly" waived their claims was not clearly erroneous. *Id.* At no point did the court in *Murtaugh* discuss, much less reject, a "reasonable inquiry" standard.[4]

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[4] Petitioners also attempt to establish a split in the circuits by citing to *Childs v. RIC Group, Inc.*, 447 F.2d 1407 (5th Cir.), *aff'g per curiam*, 331 F. Supp. 1078 (N.D. Ga. 1971). This one paragraph opinion states "Assigning written reasons, the district court granted summary judgment against the plaintiffs-appellants, Childs and Paris. They have failed to demonstrate error in that judgment on this appeal." *Id.* (footnote giving citation to district court opinion omitted). Clearly the Fifth Circuit makes no pronouncement on any point of law in this statement. Like *Royal Air* and *Murtaugh*, the opinion of the district court in *Childs* addresses a waiver – not a release – and makes no mention at all of the reasonable inquiry standard, much less its application to a release.

The Ninth Circuit's *Burgess* opinion is, at least, a release case. There, the plaintiffs had purchased interests in the defendants' tax shelter investments in cattle herds. *Id.* 727 F.2d at 830. When those investments performed poorly, the plaintiffs sold their interests back to the defendants and executed releases as part of the transactions. *Id.* On the way to losing the case at trial, the defendants unsuccessfully sought summary judgment and then a directed verdict based on the releases. *Id.* Citing *Royal Air* without discussion, the court of appeals stated that the release would be valid "only if the [plaintiffs] had 'actual knowledge' that such claims existed." *Id.* at 831. The court then simply noted that the state of the plaintiffs' knowledge was sufficiently disputed to preclude summary judgment on that point. Moreover, because a reasonable juror could find from the evidence that the plaintiffs lacked *all knowledge* of their claims, the failure to grant a directed verdict was not error. *Id.* Once again, the "reasonable inquiry" standard was not raised or discussed in the opinion, and certainly was not rejected.

In *Goodman*, on the other hand, the Seventh Circuit squarely faced the issue of whether actual knowledge of a claim was required before it could be released. The court found that a rule that "places some duty of inquiry on the party signing the release, is the more readily acceptable as fulfilling the policy requirement of the federal securities laws and needs of judicial economy." 582 F.2d at 403. The Seventh Circuit also addressed the very point on which Moseman and Rousseau argue that *Goodman* went astray of controlling Supreme Court authority: the holding in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), rejecting a "due diligence" defense in Rule 10b-5 actions.

The court of appeals cited a "significant distinction" between the substantive merits of a securities fraud claim and a release of those claims:

> In the substantive merits aspect of the case, it appears only fair that a plaintiff, compelled to prove that the defendant committed an intentional or reckless deception, should not also be forced to prove that he (the plaintiff) did not in any way contribute to his own harm.
>
> *A totally different situation occurs, however, when we are dealing with a plaintiff who has affirmatively acted to release another party from any possible liability in connection with a transaction in securities.* The mere fact that an individual has been asked to sign a release should be sufficient to put that individual on notice that a reasonable inquiry should be undertaken. No longer do we have the innocent investor sitting back and merely holding his security; we are not requiring an innocent investor continually to question management concerning his investment, but only to undertake a "reasonable inquiry" prior to taking the affirmative act of signing a release.

Id. at 404 (emphasis added).

Perhaps the biggest problem with the argument that *Royal Air* conflicts with *Goodman* is that the Ninth Circuit, which wrote *Royal Air*, has expressly rejected it. In *Petro-Venture, Inc. v. Takessian*, 967 F.2d 1337, 1338 (9th Cir. 1992), the Ninth Circuit specifically stated that it had not yet decided the issue raised in *Goodman*.

> The general rule in this circuit is that "[a] release is valid for purposes of a federal securities claim only if [there was] 'actual knowledge'

> that such claims existed." *Burgess v. Premier Corp.*, 727 F.2d 826, 831-32 (9th Cir. 1984) (citation omitted). *However, we must decide if the facts of this case warrant an exception to this rule.*

Id. at 1338 (emphasis added). The "exception" to the "general rule" would allow the release of claims that would have been discovered upon a reasonable inquiry.

To determine whether such an "exception" was warranted, the court in *Petro-Venture* explained that *Royal Air* did not answer the question at all:

> *Royal-Air* deals with a waiver of rights under the Securities Exchange Act of 1934. A waiver is "the voluntary or intentional relinquishment of a known right", but "it is unilaterally accomplished." In contrast, the release here is the result of negotiations between parties of equal bargaining power: it was not a unilateral relinquishment of rights.

Id. at 1342 (citations omitted).

Rather than *Royal Air*, the Ninth Circuit turned to *Goodman* for guidance:

> [O]ther circuits have not applied the federal policy against the release of unknown or subsequently maturing causes of action without considering the circumstances in which a right was released. . . . The Seventh Circuit has held that a party has a duty of inquiry when signing a release. The Seventh Circuit concluded that "the mere fact that an individual has been asked to sign a release should be sufficient to put that individual on notice that a reasonable inquiry should be undertaken." While we do not decide the issue of reasonable inquiry, we assume by

> the unambiguous language of the release that the parties knew they were giving up all rights to future claims.

Id. at 1342-43 (citations omitted).

In short, the only difference between the positions adopted by the Ninth Circuit and the position adopted in the Seventh and Fourth Circuits is one of semantics. While the Seventh and Fourth Circuits have endorsed "reasonable inquiry" as the basic standard for determining the validity of a release, the Ninth Circuit views "reasonable inquiry" as an exception to the general rule of actual knowledge. The Ninth Circuit's ultimate position on that "exception" may technically be undecided, but the Ninth Circuit makes clear that: (1) *Royal Air* does not decide the issue, (2) *Royal Air* does not conflict with *Goodman*, and (3) the reasoning of the *Goodman* decision is received with favor in that circuit. The Fifth Circuit, on the other hand, has never addressed the issue in any form. Hence, this Court has no "conflict in the circuits" to resolve.

II. THE DECISION BELOW WAS CORRECT

Even if there were a conflict in the circuits, this case fails to present facts that would warrant a resolution of such conflict. Irrespective of the standard applied, the decision below unquestionably is correct. With respect to Moseman, his claim would have failed under the actual knowledge standard advocated by the Petition. The uncontroverted facts as found by the district court and endorsed by the Fourth Circuit – which are not challenged by the petition – cause his claim to fail under

either standard. Moseman's lawyer helped to draft the release. At the time the release was signed, "it was obvious" to Moseman and his lawyer that Van Leer was receiving compensation in the deal that he was not disclosing to Moseman, and Moseman in fact believed he was being deceived. Nevertheless, Moseman made the conscious decision to take the money and sign the release rather than file a lawsuit. Hence, Moseman cannot benefit from any distinction between "actual knowledge" and "reasonable inquiry."

Rousseau, on the other hand, attempts to avail himself of the refuge of deliberate ignorance. Despite repeated admonitions that he retain legal counsel and his admitted understanding that it "was every man for himself," Rousseau consciously decided to make no inquiries at all, reasonable or otherwise, before accepting his deal and signing the release. Moreover, at the time he signed the release, Rousseau knew that the other shareholders were negotiating different deals and that he was foregoing his opportunity to negotiate with the new purchaser, Sanifill. Regardless of any distinction between "actual knowledge" and "reasonable inquiry," Rousseau ought not benefit from deliberately sticking his head in the sand.

Petitioners' hyperbole that the Fourth Circuit's decision "provides an instruction manual for persons committing intentional securities fraud" stands the truth on its head. The Fourth, Seventh and Ninth Circuits simply instruct persons who sign releases to make a reasonable inquiry to determine what they are releasing. It is the Petitioners, however, who would have this Court author a cookbook for mischief, allowing parties to avoid

releases merely by claiming a lack of "actual knowledge" or by remaining deliberately ignorant. Plainly, such a rule would undermine the utility of releases, making them the subject of endless litigation of what was *actually known* by the releasing party. For all the reasons advanced by the Fourth, Seventh and Ninth Circuits, this would be very bad law indeed.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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REPLY BRIEF OF PETITIONERS

To the extent that the Fourth Circuit's decision here does not directly conflict with the cited decisions of other circuits, it is only because no other court, not even the Seventh Circuit whose decision the Fourth Circuit purported to follow, has so blatantly ignored the mandate of section 29(a) of the Exchange Act as to hold that a party to a securities transaction is prevented from asserting a securities claim arising from that very transaction by a release executed as a part thereof. In any event, the fact remains that the Fourth Circuit was able to achieve that result only by applying the

Seventh Circuit's "reasonable inquiry" standard and rejecting the "actual knowledge" standard as applied by the Fifth and Ninth Circuits in the decisions cited in the petition.

Respectfully submitted,

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